

Resolution of International Commercial Disputes: Surmounting Barriers of Culture Without Going to Court

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I. INTRODUCTION

Because of the enormous growth in transnational business,¹ the number of commercial disputes between international parties is increasing.² International commercial disputes can escalate into major trade conflicts with serious political and economic repercussions. Thus, an increased need for fast and efficient dispute resolution is developing.³ This need is best satisfied through extra judicial means rather than litigation in national courts.⁴

This Note argues (1) that international commercial disputes are best resolved through use of Alternative Dispute Resolution (ADR) methods that are compatible with the cultural backgrounds of the disputants, and (2) that, no matter which ADR method—negotiation, conciliation, arbitration or a hybrid process—is ultimately selected, a third-party facilitator well socialized in the cultures of the disputants can best help the disputants quickly reach an amicable agreement. A review of the use of dispute resolution in Japan and a comparison of its use in the United States will illustrate the spectrum of ADR techniques available as well as crystallize the importance of careful consideration of ADR methods and choice of facilitator to fit the cultural backgrounds of the parties. Examination of the rise and resolution of disputes between business partners from these

¹ Transnational business involves six main types of transactions: joint ventures, licensing agreements, turnkey projects, subcontracts, management contracts and financial arrangements. See FRANK L. ACUFF, *HOW TO NEGOTIATE ANYTHING WITH ANYONE ANYWHERE AROUND THE WORLD* 11-13 (1993).

² See Thomas S. Mackey, *Litigation Involving Damages to U.S. Plaintiffs Caused by Private Corporate Japanese Defendants*, 5 *TRANSNAT'L LAW* 131, 150 (1992).

³ See Christine Lecuyer-Thieffry & Patrick Thieffry, *Negotiating Settlement of Disputes Provisions in International Business Contracts: Recent Developments in Arbitration and Other Processes*, 45 *BUS. LAW* 577, 577 (1990).

⁴ See Michael F. Hoellering, *World Trade: To Arbitrate or Mediate—That is the Question*, *DISP. RESOL. J.*, Mar. 1994, at 67.

extremely diverse cultures provides lessons applicable to relations between commercial parties from other countries as well.

II. INTERNATIONAL COMMERCE AND THE SEEDS OF DISPUTE

International commercial disputes occur for a number of reasons. Most, however, stem from difficulties in communication. Although miscommunication is possible in any business relationship, domestic or international, when parties come from different countries the risk of communication failure increases exponentially.⁵ This is because of the added cultural component.⁶

The more dissimilar their cultures of origin, the greater the potential for inaccurate perceptions, strong emotions and misunderstandings between parties when they attempt to form a relationship or negotiate a dispute.⁷ Culture, including language, is the acquired knowledge that members of a given community use to subconsciously interpret their surroundings and guide their interaction with others.⁸ Individuals from the same culture use their shared background to decipher each other's statements and actions.⁹ The overall disparity between Japanese and American cultures makes it especially hard for commercial parties from these nations to understand each other.¹⁰ As a result, the potential for the eruption of disputes between them is substantial.

The repercussions of international commercial disputes produced by cultural misunderstanding can be severe. Business people new to international commerce are at an enormous disadvantage if they are unaware of the cultural sensitivities of those with whom they conduct

⁵ See JESWALD W. SALACUSE, *MAKING GLOBAL DEALS* 45 (1991).

⁶ In addition to culture, there are six other special barriers with which international business negotiators must contend. These include: negotiating in a foreign environment, ideology, foreign bureaucracies and organizations, foreign laws and governments, multiple currencies and instability and sudden change. *See id.* at 7.

⁷ See ROBERT M. MARCH, *THE JAPANESE NEGOTIATOR: SUBTLETY AND STRATEGY BEYOND WESTERN LOGIC* 167 (1988).

⁸ See Jeffrey P. Katz & David M. Seifer, *It's a Different World Out There: Planning for Expatriate Success Through Selection, Pre-departure Training and On-Site Socialization*, *HUMAN RES. PLANNING*, June 1996, at 32, 33.

⁹ See SALACUSE, *supra* note 5, at 54-55.

¹⁰ See MARCH, *supra* note 7, at 142.

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business.¹¹ Cultural mistakes can affect profitability and competitiveness. For example, a U.S. manufacturer's sales of golf balls packaged in groups of four were frustratingly sluggish in Japan until the manufacturer learned that in Japan goods are not sold in sets of four because to the Japanese the number four connotes death.¹² This illustrates how seemingly innocent blunders can prove fatal, especially against more culturally sensitive competitors. People from other cultures are normally better trained to cope with American cultural cues than are U.S. executives with cultural cues of other countries.¹³ As a result, the U.S. may be less capable of meeting the challenges of increasingly intense global competition.

In sum, understanding the culture of an international business partner is essential to preventing future conflict. It is also vital to diffusing existing disputes. Just as other behaviors are affected by culture, "[s]trategies to manage conflict are learned and are based on assumptions of one's place in the world."¹⁴ The efficacy of a particular method of dispute resolution largely depends upon the cultural backgrounds of the disputants. Before examining the cultural factors that affect the choice among alternatives, litigation should readily be rejected as an acceptable way to resolve international commercial disputes because of the many additional problems that it produces.

¹¹ See Jack Wilcox, *Business Etiquette Skills Increase Export Success*, FOOD CAN., June 1, 1996, at 23, available in WESTLAW, 1996 WL 10069596. One suggestion to find out quickly about some of the practices of other cultures is to contact embassy advisors. The staff may know the business protocol. See *id.* Additionally, international banks, universities and corporations with foreign subsidiaries may be good sources of information. Also, the lawyer, business consultant or interpreter hired to work on the deal can offer much valuable advice on how culture may affect the negotiating process, communications between parties, the structure of the transaction and the execution of the deal itself. See SALACUSE, *supra* note 5, at 54-55.

¹² See David R. Sands, *Global Businesses Find That Money Isn't the Lingua Franca*, INSIGHT ON THE NEWS, Jan. 30, 1995, at 32, 34, available in WESTLAW, 1995 WL 12331979, at *3.

¹³ See *id.* at *1.

¹⁴ Robert T. Moran et al., *Japan*, in GLOBAL PERSPECTIVES ON ORGANIZATIONAL CONFLICT 33, 36 (M. Afzalur Rahim & Albert A. Blum eds., 1994).

III. LITIGATION AND THE ADDED TRIALS OF INTERNATIONAL COMMERCIAL DISPUTES

When an international commercial dispute arises, litigation is usually the least appealing method to resolve the conflict. The extensive, well-documented problems with litigation of ordinary commercial disputes include high cost, the likelihood of injury to the underlying commercial relationship and the uncertainty of the outcome. International transactions, however, carry an additional set of interrelated problems,¹⁵ such as forum shopping, procedural complexities, enforcement, added costs and sovereign immunity.

The choice of where to litigate is the first decision that parties to an international commercial dispute face. Forum shopping arises because the non-native party will understandably resist litigation on the other side's turf. Assuming fairness of the courts in most countries, differences between systems of thinking and conducting business in various parts of the world mean that a native will usually present a more convincing case than an outsider.¹⁶ The possibility of multiple forums also makes simultaneous litigation and inconsistent outcomes possible. "Differences in substantive law, public policy, and procedures . . . naturally encourage the parties in a dispute to calculate the advantage to them in selecting one available forum over another."¹⁷ For example, Japanese defendants resist litigation in American courts because damages obtainable against them there are disproportionate to those possible elsewhere.¹⁸

Americans likewise tend to reject litigation in civil law countries like Japan. Their main concern is procedural differences. The U.S. procedural system is extremely refined. A lack of similarly sophisticated discovery abroad can create an inability to prove cases for Americans.¹⁹ Discovery in Japan is much different from that in the U.S.²⁰ For example, in Japan, unless the attorney has obtained special authorization, the judge, not the

¹⁵ See Steven C. Nelson, *Alternatives to Litigation of International Disputes*, 23 INT'L LAW. 187, 188 (1989).

¹⁶ See Lecuyer-Thieffry & Thieffry, *supra* note 3, at 582.

¹⁷ Nelson, *supra* note 15, at 188.

¹⁸ See Lecuyer-Thieffry & Thieffry, *supra* note 3, at 587.

¹⁹ See *id.* at 584.

²⁰ Japan joined the Hague Convention, but it did not ratify the proceedings on taking evidence abroad. See Mackey, *supra* note 2, at 133.

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attorney, takes evidence. In a deposition, it is the judge who examines witnesses and summarizes the information. An unwary attorney from the U.S. who takes a deposition or inspects documents in Japan under the familiar American rules can unwittingly violate Japan's judicial sovereignty.²¹ The procedural dilemma cuts the other way for parties from civil law countries like Japan. They are faced with greater procedural burdens in U.S. courts than at home. Procedural differences also increase the potential for confusion as well as the likelihood of additional disputes that are unrelated to the main issues between the parties.²²

Unfortunately, many judgments are largely worthless outside of the country whose courts rendered them.²³ Litigation is meaningless if the end result is unenforceable. Foreign courts are often unwilling to enforce the judgments of U.S. courts, and U.S. courts rarely enforce foreign judgments without close scrutiny.²⁴ For example, in transnational litigation between parties from the U.S. and Japan, the lack of willingness of Japanese courts to enforce U.S. judgments against Japanese defendants is a serious legal problem. Punitive damages awarded in the U.S. are not recognized in Japan because they are against public policy.²⁵ Also, enforcement of injunctions and other equitable remedies poses problems because Japan has no equity court tradition. Instead, courts in Japan must rely upon specific statutory authorization, and it is generally not available for ordinary torts and breaches of contract.²⁶

Another problem with litigation of international disputes is added expense. Although litigation between domestic parties is costly, expenses involved with litigation of international commercial disputes are even higher. Counsel is often needed in more than one country and additional time and travel are required. Enforcement expenses and additional

²¹ *See id.* at 150.

²² *See Nelson, supra* note 15, at 189.

²³ *See Lecuyer-Thieffry & Thieffry, supra* note 3, at 585. Foreign judgments, despite a clearly favorable legal environment toward their recognition and enforcement in many countries, including the U.S., are still reviewed to some extent, and procedural delays often result. *See id.*

²⁴ *See Nelson, supra* note 15, at 190.

²⁵ *See Mackey, supra* note 2, at 172.

²⁶ *See id.* at 177.

procedural complexities also create significant extra costs.²⁷ Translations of documents and interpreter expenses add to the tally as well.²⁸

Even without the various problems of litigation discussed above, U.S. courts will often decide not to hear cases that would require them to judge the sovereign acts of a foreign government.²⁹ Differentiation between "commercial" and "sovereign" activities is increasingly difficult as state-owned business enterprises in nonmarket economies such as the People's Republic of China intensify their participation in international commerce.

Perhaps most importantly, parties from some countries have a culturally-based distaste for litigation, whether abroad or at home. The Japanese, for example, abhor litigation. This is not because Japan has a system of courts any less civilized than those of Western nations.³⁰ Rather, "resort to litigation has been condemned as morally wrong, subversive and rebellious."³¹ Thus, "the first encounter of the Japanese with American legal aggression comes as a great shock."³² The Japanese liken the American instinct for litigation to that of a shark when it scents blood.³³

Domestically, the Japanese seldom consult lawyers.³⁴ Even left with little alternative, many Japanese still hesitate to knock on the door of a law

²⁷ See Nelson, *supra* note 15, at 193.

²⁸ See Mackey, *supra* note 2, at 153.

²⁹ See Nelson, *supra* note 15, at 191-192.

³⁰ See Hideo Tanaka, *The Role of Law and Lawyers in Japanese Society*, in INSIDE THE JAPANESE SYSTEM: READINGS ON CONTEMPORARY SOCIETY AND POLITICAL ECONOMY 194, 194 (Daniel I. Okimoto & Thomas P. Rohlen eds., 1988) [hereinafter INSIDE THE JAPANESE SYSTEM].

³¹ Takeyoshi Kawashima & Yosiyuki Noda, *Dispute Resolution in Contemporary Japan*, in INSIDE THE JAPANESE SYSTEM, *supra* note 30, at 191.

³² MARCH, *supra* note 7, at 119.

³³ Even the chairman of Sony, Akio Morita, who is perhaps the most internationally-minded business figure in Japan, was stunned when Sony was challenged in a U.S. court by its own business partner. *See id.*

³⁴ Although Japan has 125 million citizens, the country has only 60,000 lawyers, compared with 700,000 lawyers in the U.S., a country with roughly double the population of Japan. *See* David Broiles, *When Myths Collide: An Analysis of Conflicting U.S.-Japanese Views on Economics, Law, and Values*, 1 TEX. WESLEYAN L. REV. 109, 133 (1994). Only about 500 new lawyers are admitted to practice each year in Japan (the bar examination is extremely difficult and the pass rate is only three percent annually), and the largest law office has only 40 lawyers. *See* MARCH, *supra* note 7, at 117. But see FRANK K. UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN 2 (1987), noting that:

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office. On a per capita basis, the number of civil suits brought in Japan is twenty times lower than that in the U.S.³⁵ When pressed to litigate, parties would rather argue their own cases in court. Both defendant and plaintiff are represented by attorneys in only forty percent of cases.³⁶ To illustrate the nonlitigiousness of the Japanese, after a fatal 1985 air crash in Japan, although all the families of the foreign victims sued, only twenty percent of the 500 Japanese victims' families brought suit.³⁷ "Even corporations, which are supposed to embody the modern rationalistic spirit, often fail to consult their attorneys" ³⁸

The Japanese also avoid litigation of international commercial disputes. From 1986–1990, only ninety-four cases in Japanese courts involved any foreign parties. During the same time period, the Japanese were party to 1976 U.S. court cases, compared with 13,645 and 6138 in which English and German parties participated, respectively.³⁹ These contrasting numbers testify to the distaste of the Japanese for litigation.

Legal scholars have argued that the definition used in determining the number of Japanese lawyers excludes large numbers of professionals who do what would be considered legal work elsewhere, and that the supposedly low litigation rate is actually within the normal range for industrialized democracies. Others have directly challenged the cultural approach and have instead attributed any relative Japanese disinclination to litigation to deliberately created barriers that render litigation less cost-effective than mediation or conciliation. . . . These scholars dismiss the cultural explanation as a politically convenient myth used by Japanese elites to legitimate the suppression of conflict.

³⁵ See UPHAM, *supra* note 34, at 195; see also Broiles, *supra* note 34, at 135 (stating "[w]hile Japan is a country of law, it is not a country in which litigation plays a significant role"); see also, e.g., DAN FENNO HENDERSON, *CONCILIATION AND JAPANESE LAW—TOKUGAWA AND MODERN 195–197* (1965). But see HIROSHI ODA, *JAPANESE LAW 87* (1992) (noting "[t]his previous influential view of 'non-litigiousness' of the Japanese is now being questioned.").

³⁶ See Tanaka, *supra* note 30, at 194.

³⁷ See Broiles, *supra* note 34, at 134.

³⁸ Kawashima & Noda, *supra* note 31, at 196.

³⁹ See Masato Dogauchi, *The Internationalization of Dispute Resolution in Japan*, in *JAPANESE COMMERCIAL LAW IN AN ERA OF INTERNATIONALIZATION* 237, 237–247 (Hiroshi Oda ed., 1994); see also, e.g., Harold See, *The Judiciary and Dispute Resolution in Japan: A Survey*, in KENNETH L. PORT, *COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN* 483, 483 (1996) [hereinafter PORT, *COMPARATIVE LAW*] (noting "[a]lthough litigation is increasing in Japan, in comparison with similarly developed industrialized nations, the number of cases litigated remains low.").

In conclusion, litigation is not an advisable method to resolve most international commercial disputes. In addition to its usual problems, litigation of such disputes carries added financial and cultural difficulties. Furthermore, traditional biases in some nations against litigation make alternatives desirable. Which alternative is ultimately selected depends largely upon the cultural backgrounds of the parties.

IV. THE EFFECT OF CULTURAL FACTORS ON INTERNATIONAL COMMERCIAL RELATIONS

The self-perception of parties and their ideas about one another are reflected in the commercial relations between them. The most appropriate ADR method to resolve a particular international commercial dispute depends upon which method best fits with the cultural backgrounds of the disputants. There are five factors that most affect how parties within a particular culture interact:⁴⁰ degree of individualism versus collectivism,

⁴⁰ Because models are less useful the more complex they become, discussion here is limited to five major factors useful in a comparison between Americans and Japanese. Many additional cultural traits, each stretching across a continuum from Type A to Type B, have been identified as affecting negotiations. To summarize in chart form, these include:

<u>Trait</u>	<u>Type A</u>	<u>Type B</u>
Goal	Contract	Relationship
Communications	Direct	Indirect
Personal styles	Informal	Formal
Attitudes	Win/lose	Win/win
Agreement form	Specific	General
Time sensitivity	High	Low
Emotionalism	High	Low
Agreement building	Bottom-up	Top-down
Team organization	One leader	Consensus
Risk taking	High	Low

Most cultures have negotiating traits that draw from both types. Americans, however, strongly tend to be Type A, while Japanese gravitate toward Type B. *See* SALACUSE, *supra* note 5, at 70-71. Hofstede, a scholar increasingly cited in cross-cultural and international business studies, does not find such total polarization of Japanese and Americans. In his model, 50 countries are ranked based upon four cultural dimensions: power/distance, individualism/collectivism, masculinity/femininity and uncertainty/avoidance. The U.S. and Japan ranked 38:33, 1:22, 15:1, 43:47, respectively. *See* ROY J. LEWICKI ET AL., *NEGOTIATION* 417-418 (1994).

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patterns of communication, nature of agreements, use of time and risk propensity.

A. *Individualism vs. Collectivism*

Societies are organized either around individuals or around groups. Individualistic cultures encourage independence, while collectivist cultures focus on cultivating and maintaining long-term, interdependent relationships within a cohesive group. Americans, for instance, are individualistic. They believe that the individual is the atom from which society is built. Individual actors are equal and free to succeed in the market and contribute to the economy efficiently. The state is tolerated only as a regulator of the social contract between individuals. Laws create duties for some and give rights or privileges to others.⁴¹ Although Americans measure success by the degree of individual freedom attained, as a group or society they believe everyone could and should be like the United States. They are often intolerant of those who are not.⁴² In the incessant disputes with the U.S., perhaps "Japan's biggest sin is not being more like America."⁴³

Rather than a cultural proclivity toward the individual and "equality" in relationships, most Asian cultures have an intellectual and social predisposition toward a natural hierarchy that governs conduct in interpersonal relations.⁴⁴ Japan is no different. "[I]n the beginning there is society, and . . . individual development is only possible because of the sustenance of the community."⁴⁵ The individual owes duties and obligations to the groups that fostered the person's development. Individual

⁴¹ See Broiles, *supra* note 34, at 119.

⁴² See *id.* at 139; see also Samfrits Le Poole, *John Wayne Goes to Brussels*, in ROY J. LEWICKI ET AL., *NEGOTIATION: READINGS, EXERCISES AND CASES* 554, 554 (1993) (stating "Americans have neither the tradition nor the necessity of living internationally. Their ignorance about foreign countries, cultures and customs, their lack of linguistic abilities, and their inability to always respect foreign sensitivities are entirely understandable. . . . [Others] take offense [however] when . . . American ignorance goes arm-in-arm with American arrogance.").

⁴³ Broiles, *supra* note 34, at 139.

⁴⁴ See M. Scott Donahay, *Seeking Harmony—Is the Asian Concept of the Conciliator / Arbitrator Applicable in the West?*, *DISP. RESOL. J.*, Apr.–June 1995, at 74, 74.

⁴⁵ Broiles, *supra* note 34, at 139.

rights are a foreign concept.⁴⁶ As a culture, the Japanese would rather work together in good faith and harmony to build consensus, than to insist on enforcement of rules and legal rights.⁴⁷ The Japanese consider civil disputes as reflections of damaged relations between parties. Disturbance of the *wa* ("harmony") carries social condemnation nearly comparable to a criminal act.

To the Japanese, the group is all important. As a large group, the Japanese tend to think of themselves as a very unique people.⁴⁸ Smaller groups in society also give a person identity, and relationships can be defined in terms of "in-group" and "out-group." The individual largely ignores those in the out-group or treats them with polite indifference. The in-group, on the other hand, has great influence over individual behavior. In fact, society has such a grip over the individual that Japanese culture has been referred to as a "sociocult."⁴⁹ Thus, Japanese morality, instead of being rule-based, is situational, depending upon the social situation in which the actor finds himself.⁵⁰ When threatened or assaulted by others from the outside, the Japanese immediately see it as unfair. They see themselves as weak, defenseless and victimized. After all, as social actors with minimal power, they believe that they have little control over external circumstances and fatalistically accept their lots. This victim mentality often surfaces in both domestic and international business relations.⁵¹ For

⁴⁶ See Kawashima & Noda, *supra* note 31, at 191 (noting that the Japanese word for "right" was not invented until the French civil code was translated at the turn of the century and that, even today, "[t]he concept still has a long and tortuous way to go before taking firm root in [Japan].").

⁴⁷ See Broiles, *supra* note 34, at 136. To the Japanese, the distinction between good and evil is more a question of submission or nonsubmission to the will of their group or to that of a superior than of blind obedience to black and white laws. See *id.* at 138; see also HENDERSON, *supra* note 35, at 174 (stating that beginning with Japan's medieval period and founded upon Confucian philosophy, "[j]ustice was relational. . . . Duty, not right, was the emphasis.").

⁴⁸ See CALVIN MORRILL, *THE EXECUTIVE WAY: CONFLICT MANAGEMENT IN CORPORATIONS* 226 (1995).

⁴⁹ See, e.g., John O. Haley, *Dispute Resolution in Japan: Lessons in Autonomy*, 17 CAN.-U.S. L.J. 443, 447 (1991) (stating "[I]n Japan the threat of tyranny comes more from society than the state.").

⁵⁰ See Rajesh Kumar, *Affect, Cognition, and Decision Making in Negotiation: A Conceptual Integration*, in *MANAGING CONFLICT: AN INTERDISCIPLINARY APPROACH* 190 (M. Afzalur Rahim ed., 1989).

⁵¹ See MARCH, *supra* note 7, at 126.

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example, the Japanese are quick to ask to alter contracts to fit changed circumstances and feel unfairly treated if the other side is unwilling to make adjustments.

Both the emphasis on harmonious group action and the unified belief of unjust treatment by outsiders create cohesive Japanese teams of claimants that can easily intimidate unseasoned Western negotiators.⁵² Looking for cracks in the armor of the Japanese requires close attention to their communications.

B. *Patterns of Communication*

Successful international commercial relations depend heavily upon good communication. The patterns of communication that a culture uses compose the second cultural factor that affects interaction between parties to international commercial transactions. Parties that do not carefully observe cultural rules of communication risk insulting, angering or embarrassing the other side.

Culture heavily influences both verbal and nonverbal communication. In general, Americans are open and gregarious. The Japanese, on the other hand, are usually not very expressive outside of the group. From an early age, the Japanese learn to put a "face" over their true feelings because the "direct expression of emotions . . . is uncultured and even improper."⁵³ Verbosity is considered a personal defect,⁵⁴ and silence is praised. "[A]s long as you remain silent, you project a favorable impression and are assumed to be thinking deeply"⁵⁵ The contrast between these general patterns of communication can spell trouble during both verbal and nonverbal interaction between Americans and Japanese.

As suggested, the Japanese are comfortable without a great deal of verbal interaction. "Japanese are not embarrassed by prolonged silence during a business meeting; rather, it is considered useful."⁵⁶ In contrast, Americans are quickly frustrated or made very anxious by silence and

⁵² See *id.* at 154.

⁵³ *Id.* at 142. Behavior, both verbal and nonverbal, that is permissible for public consumption is called *tatemaie*, as opposed to *honne*, which represents "one's true feelings and thoughts." *Id.*

⁵⁴ See *id.* at 88.

⁵⁵ *Id.* at 15-16.

⁵⁶ Sands, *supra* note 12, at 23.

seeming passivity.⁵⁷ They will simply speak to fill the void, a practice that can have harmful repercussions in sensitive negotiations with the taciturn Japanese. Americans expect prompt answers and sometimes interpret Japanese silence as rudeness, lack of understanding or a cunning tactic to get them to reveal themselves.⁵⁸ Meanwhile, many Japanese find the authoritative lecturing style of Americans offensive.⁵⁹

Language inadequacies on one or both sides can also cause problems.⁶⁰ For instance, many Americans believe that Japanese who speak passable conversational English can comprehend colloquial expressions, jokes or small talk. Meanwhile, because cultural harmony is emphasized over individual expression in Japan, the Japanese may have difficulty expressing opinions. Even if they speak perfect English, the Japanese seldom directly express what they think or want. They are reluctant to risk loss of "face" (honor) should they be wrong or should their request be denied. This may make the Japanese seem "shy" to Americans.

The Japanese also often have difficulty saying "no" because direct confrontation or open disagreement can lead to loss of face. Thus, lack of sensitivity to the importance of harmony in interpersonal relations when dealing with the Japanese can quickly lead to misunderstandings. The ability to pick up on the Japanese indirect way of denying a request takes years of experience with the culture to develop.⁶¹ For example, an American usually interprets "that's difficult" spoken by a fellow countryman as meaning that the door is still open for further discussion. However, when a Japanese uses the same words in response to a proposal,

⁵⁷ See DEAN ALLEN FOSTER, *BARGAINING ACROSS BORDERS: HOW TO NEGOTIATE BUSINESS SUCCESSFULLY ANYWHERE IN THE WORLD* 98 (1992).

⁵⁸ See SALACUSE, *supra* note 5, at 47.

⁵⁹ See MARCH, *supra* note 7, at 88.

⁶⁰ At least one author claims that people who negotiate in a second language communicate better than in their native tongue. This may be because each party "takes steps, consciously or sub-consciously, to communicate simply and effectively, to strengthen the non-verbal processes in their communication, to listen effectively, and to check on one another's understanding." BILL SCOTT, *THE SKILLS OF NEGOTIATING* 72 (1985). This may be true if *both* sides are using a neutral, non-native language—for example, a Korean and a German negotiating in English. It is doubtful, however, that an inexperienced negotiator speaking his native language would be nearly as alert and patient as a negotiator speaking in a non-native language or as an experienced, culturally-sensitive negotiator speaking in his native language.

⁶¹ See Bradford Hall & Mutsumi Noguchi, *Engaging in Kenson: An Extended Case Study of One Form of "Common" Sense*, 48 HUM. RELATIONS 1129, 1131 (1995).

he intimates that the proposal is unacceptable.⁶² Even when the Japanese side seems to agree, its American counterpart may simply have failed to understand that the custom of repeatedly replying “*hai*” (“yes”) signifies mere comprehension and not necessarily agreement with the statement or proposal.⁶³

When it comes to nonverbal communication, Americans tend to be hand-shakers and back-slappers. In contrast, the mostly nonexpressive Japanese have a largely motionless, “no-touch” culture.⁶⁴ They cannot remain completely still, however, and their receptivity to another can be read from slight physical cues.⁶⁵ The time for reading what is occurring is short and demands a supersensitivity to nonverbal behavioral changes.⁶⁶ For instance, a quick inhaling of air or sucking air through the teeth can indicate a serious problem among the Japanese.⁶⁷

The face is also important to watch. Japanese culture demands that its members keep an impassive, immobile social face in most situations.⁶⁸ The required control can take years of training to achieve. Slight changes in facial expression can reveal a great deal of information. The hands, too, are important. During business meetings, many Japanese sit passively, their hands folded away. They consider wide motions of the hands to be hostile.⁶⁹ Finally, eye contact can be revealing. Japanese usually avoid eye contact because they consider staring impolite. They may even listen with their eyes entirely closed to avoid being rude, a practice that can frustrate a Western speaker who depends upon eye contact to gain feedback on the amount of impact achieved.⁷⁰ Careful attention can yield more effective communication and result in more harmonious agreements.

⁶² See SALACUSE, *supra* note 5, at 46–47.

⁶³ See MARCH, *supra* note 7, at 41.

⁶⁴ See W. D. PIENAAR & H. I. J. SPOELSTRA, *NEGOTIATION: THEORIES, STRATEGIES AND SKILLS* 228 (1991).

⁶⁵ See MARCH, *supra* note 7, at 146–147.

⁶⁶ See *id.* at 146.

⁶⁷ See *id.* at 73.

⁶⁸ See *id.* at 145. This blank, uncomprehending exterior is “*shirankao*” (literally, “knowing nothing face”). See *id.*

⁶⁹ See PIENAAR & SPOELSTRA, *supra* note 64, at 231.

⁷⁰ See MARCH, *supra* note 7, at 146.

C. Nature of Agreements

International commerce takes place through contracts, and cultural differences can influence the form and substance of the deal.⁷¹ Americans tend to follow a detailed formal progression in negotiations that culminates in a lengthy contract that clearly defines each party's rights and obligations. Individuals are bound to fulfill the obligations to which they voluntarily agreed. Otherwise, a breach action which has overtones of moral culpability may follow, and the law will force performance or payment.

In Japan, contract law is largely unnecessary because contracting is possible without contracts.⁷² Among the Japanese themselves, verbal contracts based solely upon trust remain common because the Japanese continue to value their public reputations, or face. Although for Westerners the most important aspect of the "deal" is contained in the documents, the most important facet in Japan is the harmonious relationship between parties.⁷³ "[T]hey view an impersonal relationship as almost sordid."⁷⁴

"For the Japanese, the group relationship created and sustained is important; the goal of the arrangement being to work together to fulfill each other's expectations in a mutually advantageous way."⁷⁵ For example, the Japanese tend to resist the idea of full-blown due diligence. In a sales contract, the burden of investigation is on the seller, not the buyer, a practice that contrasts sharply with Western ideas of *caveat emptor*.⁷⁶ To the Japanese, too much attention to details is considered intrusive or, even worse, signifies mistrust or bad faith and can be a deal breaker.⁷⁷

Rather than trying to define all possible contingencies, the Japanese prefer to handle problems as they arise. When contracts are used, Japanese

⁷¹ See SALACUSE, *supra* note 5, at 50.

⁷² See Michael J. Smitka, *Contracting Without Contracts: How the Japanese Manage Organizational Transactions*, in THE LEGALISTIC ORGANIZATION 91, 93 (Sim B. Sitkin & Robert J. Bies eds., 1994).

⁷³ See Wilson Chu, *The Human Side of Examining a Foreign Target*, MERGERS & ACQUISITIONS, Jan.-Feb. 1996, at 35, 37.

⁷⁴ PIENAAR & SPOELSTRA, *supra* note 64, at 225-226.

⁷⁵ Broiles, *supra* note 34, at 128.

⁷⁶ See Chu, *supra* note 73, at 36. In Japan, the seller must in good faith satisfy the buyer's reasonable expectations. This practice stems from the desire of Japanese businessmen to preserve long-term relations with customers and a long-standing Japanese tradition of honesty in business transactions. See *id.*

⁷⁷ See *id.* at 35.

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companies prefer short, vague contracts, and a point will be made of not reading the fine print.⁷⁸ Thus, although the Japanese believe promises should be honored, contracts are not especially important. Specific terms remain open to renegotiation, even immediately after signing.⁷⁹ As expected, there are few suits for breach of contract in Japan.

The Japanese may accept the fact that international business often requires use of long, detailed contracts, but they feel more comfortable with flexible arrangements.⁸⁰ If unforeseen circumstances occur, it seems natural and obvious to change the contract, and the parties expect to renegotiate a new burden-sharing solution. The Japanese soon come to resent "friends" who selfishly try to take advantage of a changed situation and disregard requests for help in times of trouble.⁸¹

D. *Use of Time*

Culture has a great impact on the definition of time, and misunderstandings due to different perceptions of time can easily occur in cross-cultural business relations. Americans tend to worship time as a commodity that they do not like to waste. They believe "faster" is better than "slower." "Americans are often known as the world's fastest dealers. They operate as if there were no tomorrow and very little left of today."⁸²

Japanese behavior, however, is highly regulated by rules that pervade the whole society and is heavily standardized. Even Japanese at a senior level have little or no freedom either to behave other than as expected or to act as individuals.⁸³ Thus, when dealing with others, there is a lack of hurry because everyone knows their place and their role. As a result, the Japanese may seem to lack spontaneity and appear supremely calm. Building consensus among the group often requires significant time. Also, whether to personalize the business relationship at the outset of negotiations or to master technical points, the Japanese are noted for their innumerable, detailed questions that appear to have little or no relevance to the major issues at hand. Regardless of the amount of time it takes, they will persist

⁷⁸ See MARCH, *supra* note 7, at 17.

⁷⁹ See *id.* at 112.

⁸⁰ See PIENAAR & SPOELSTRA, *supra* note 64, at 230.

⁸¹ See MARCH, *supra* note 7, at 98.

⁸² PIENAAR & SPOELSTRA, *supra* note 64, at 222.

⁸³ See MARCH, *supra* note 7, at 159.

with such inquiries until they are satisfied or until their counterpart loses patience.

Another effective strategy used by the Japanese against an unsuspecting foreign negotiator who has booked a trip to Japan with a full itinerary and a fixed departure date is to simply stall. Just prior to the boarding announcement at the airport, the Japanese side will make a take-it-or-leave-it offer barely good enough to be accepted.⁸⁴ The way a culture perceives and uses time can have a great effect on the international commercial relationship.

E. *Risk Propensity*

Cultures differ in the amount of risk they are willing to take. While risk-avoiding cultures will continually seek further information and move slowly to fully consider all options, risk-oriented cultures will take more chances and move quickly on deals. American culture is among the least formal cultures in the world. Individuals need not follow prescribed behavioral patterns. Americans are allowed great latitude in personal decisionmaking. They are encouraged to take risks and are rewarded accordingly.

The Japanese are just the opposite. Because a Japanese person does not want to stand out from the group, recognition of an individual for personal achievement often decreases the motivation of the rewarded individual.⁸⁵ Japanese culture also dictates a great deal of what is to be said and done in a particular situation. Social formalities are substantial and significant. For example, when Japanese meet each other for the first time, they go through a ceremonial exchange of business cards.⁸⁶ Formalities are also present when Japanese address one another. They never call each other by their first names. Instead, honorific titles indicating status or position are the norm.

Although in pre-arranged events the Japanese know how they are to interact with members of the out-group, in poorly structured settings they seem to lose their bearing. For instance, unlike their Western counterparts who do not hesitate to put forward their own views, in an initial meeting of

⁸⁴ See *id.* at 175.

⁸⁵ See Katz & Seifer, *supra* note 8, at 45.

⁸⁶ In Tokyo alone, 12 million business cards (*meishi*) are ceremonially exchanged daily. See Wilcox, *supra* note 11, at 24.

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a new group, the Japanese refrain from taking any initiative. They merely sit around seeming determined not to do anything.⁸⁷ Once consensus on a course of action is achieved, however, there is little room to change direction. Thus, in an international business negotiation, the Japanese side may constantly reiterate the same offer, with little or no variation.⁸⁸ They often persist with extreme strategies even if they believe that there is no hope of winning.⁸⁹ Faced with such stubbornness, U.S. businessmen become frustrated and try harder and harder to achieve their goal, not realizing that their aggressive behavior ruins any chance of a favorable outcome.⁹⁰ "The polite, soft-spoken Japanese are rarely susceptible to intimidation."⁹¹

In sum, the Japanese generally favor "cultivating harmonious relationships, avoiding direct confrontation, seeking the advice of respected elders, saving another person's 'face,' and group solidarity."⁹² Americans, however, in addition to possessing limited experience with other cultures, are viewed as being direct, impatient loners who take a legalistic approach and focus on short-term results instead of long-term relationships.⁹³ These cultural characteristics are important to selection of an ADR method that best suits the parties to an international commercial dispute.

V. USE OF ADR IN INTERNATIONAL COMMERCE

The disadvantages of litigation discussed above give parties to international commercial disputes added incentive to try different means of dispute resolution. Because these methods supplement litigation, in countries in which litigation is the norm they are considered "alternative." Many parties, in light of their cultural heritage, favor extrajudicial methods of ADR because they allow parties to reach a win-win outcome in which all

⁸⁷ See MARCH, *supra* note 7, at 24.

⁸⁸ See *id.* at 130.

⁸⁹ See *id.* at 97.

⁹⁰ See Kumar, *supra* note 50, at 191.

⁹¹ MARCH, *supra* note 7, at 86-87.

⁹² Steven J. Burton, *Combining Conciliation with Arbitration of International Commercial Disputes*, 18 HASTINGS INT'L & COMP. L. REV. 637, 641 (1995).

⁹³ See ACUFF, *supra* note 1, at 43-49.

participants save face. This is especially true among Asian nations,⁹⁴ and “[i]ncreasing receptivity of American business to ADR over the last decade is due in part to exposure to nonwestern dispute resolution mechanisms.”⁹⁵ Parties often use ADR in international commerce because it allows a neutral forum, free from bias toward either party.⁹⁶ They most often turn to arbitration, negotiation and conciliation.

A. Arbitration

Arbitration, perhaps because of its resemblance to already familiar domestic litigation, is the most popular method of resolution of international commercial disputes and allows parties to avoid many of the problems associated with litigation. “Differences between legal systems have traditionally made arbitration attractive: it is by its essence the most international means of settling disputes”⁹⁷ because it provides a neutral option. Arbitration is also the most formal and oldest method of ADR in international commerce.⁹⁸

The merits of arbitration of international commercial disputes are well-documented. “Arbitration provides a neutral forum away from either party’s home jurisdiction, protecting against real and imagined prejudices and unfamiliar legal practices.”⁹⁹ Use of arbitration also reduces legal expenses and time needed to settle disputes. Arbitration allows the parties

⁹⁴ See Linda C. Reif, *Conciliation as a Mechanism for the Resolution of International Economic and Business Disputes*, 14 FORDHAM INT’L L.J. 578, 579–580 (1991).

⁹⁵ Lucy V. Katz, *Enforcing an ADR Clause—Are Good Intentions All You Have?*, 26 AM. BUS. L.J. 575, 580 (1988). Other reasons for increased receptivity to ADR include growing hostility to the judicial system as well as heightened judicial acceptance of ADR as a matter of public policy. *See id.*

⁹⁶ *See id.* at 581.

⁹⁷ Lecuyer-Thieffry & Thieffry, *supra* note 3, at 581.

⁹⁸ *See* Katz, *supra* note 95, at 577; *see also* Mackey, *supra* note 2, at 178 (reporting that one popular provider of arbitration services for transnational commercial disputes, the International Chamber of Commerce (ICC) Court of Arbitration, was founded as early as 1923 and has arbitrated over 6000 cases, involving some 89 different countries). In fact, the use of arbitration is so widespread that one commentator remarked that “[i]t is unlikely that ADRs other than arbitration . . . have a significant future in international business.” Lecuyer-Thieffry & Thieffry, *supra* note 3, at 590.

⁹⁹ Burton, *supra* note 92, at 637.

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to customize the arbitral procedure, including the choice of location, language of the proceedings and applicable law,¹⁰⁰ as well as to maintain privacy.¹⁰¹ Finally, there are rarely problems with arbitration-clause enforcement; and, more importantly, an arbitral award provides a binding solution enforceable at law.¹⁰²

Depending upon the nature of the dispute and countries of origin of the disputants, however, arbitration may not be advisable. "Zealous and opportunistic litigation practices are increasingly supplanting courtly manners in international commercial arbitrations. As a practical matter, claims that arbitration is faster and cheaper than litigation appear increasingly ungrounded."¹⁰³ This is especially true when a lot is at stake. Moreover, the need for interim protective measures such as temporary injunctions, evidence from unwilling third parties or joinder of others may greatly complicate arbitration.¹⁰⁴ Finally, it is often difficult to get international parties to reach an accord on important steps of the arbitral proceedings.¹⁰⁵

The disadvantages of arbitration listed above are common to all international parties. For arbitrations between Asian and Western parties, however, there is an added cultural drawback. Many Asian cultures, including Japan, detest such a confrontational form of dispute resolution. They prefer face-saving, mutually agreeable compromises rather than edicts proclaiming one party's rights. As a result, Asian parties may oppose clauses that immediately send disputes to arbitration.¹⁰⁶

Although Japanese courts recognize the validity of arbitration awards rendered in foreign countries and agree to enforce them,¹⁰⁷ the Japanese do not like arbitration for many of the same reasons that other Asians find it

¹⁰⁰ See Hoellering, *supra* note 4, at 67.

¹⁰¹ See Burton, *supra* note 92, at 637.

¹⁰² See Mackey, *supra* note 2, at 180. In fact, the main reason for preferring arbitration over court proceedings may be the comparatively easy enforcement of arbitral awards within the countries that ratified the New York Convention. See Katz, *supra* note 95, at 577.

¹⁰³ Burton, *supra* note 92, at 637.

¹⁰⁴ See *id.*

¹⁰⁵ See Lecuyer-Thieffry & Thieffry, *supra* note 3, at 590.

¹⁰⁶ See Burton, *supra* note 92, at 638.

¹⁰⁷ Japan signed the New York Convention in 1961; the U.S. ratified the Treaty in 1968. See Mackey, *supra* note 2, at 136.

distasteful.¹⁰⁸ The Japanese business community, for example, rarely resorts to arbitration to resolve domestic commercial disputes.¹⁰⁹ At home, the Japanese favor conciliation. To resolve conflicts arising out of international business transactions, however, the Japanese do utilize arbitration. The seemingly strange preference of conciliation for domestic matters but arbitration for international commercial disputes may be because foreign parties are unfamiliar with conciliation.¹¹⁰ The Japanese recognize that their own preference, unmatched by support from the other side, is not enough. Both sides must agree to conciliation for the method to be successful. Arbitration provides the next best alternative.

In sum, "the West with its law consciousness and its inclination towards . . . arbitration seems to have dominated the transnational business system."¹¹¹ Thus, arbitration may continue its position of primacy for some time. Given their own choice, however, the Japanese and others would probably not choose arbitration.¹¹²

B. Negotiation

In the commercial world, negotiation is the workhorse used for interaction between business partners, as well as when disputes arise. In

¹⁰⁸ See, e.g., Nobuaki Iwai, *Alternative Dispute Resolution in Court: The Japanese Experience*, in PORT, COMPARATIVE LAW, *supra* note 39, at 474 (noting "[d]espite the general unpopularity of arbitration in Japanese society, [it has] been commonly used for resolving international disputes.").

¹⁰⁹ See Lecuyer-Thieffry & Thieffry, *supra* note 3, at 578.

¹¹⁰ See Reif, *supra* note 94, at 629–630. As Japan clearly illustrates, a nation's long tradition of conciliation as a mechanism for the settlement of domestic disputes does not automatically mean that it will use conciliation to resolve international business disputes. See *id.* at 634.

¹¹¹ *Id.* at 634.

¹¹² See, e.g., Dogauchi, *supra* note 39, at 237–247. International commercial arbitrations performed in Japan from 1986–1990 numbered only 310 cases involving U.S. parties. According to ICC Arbitration statistics, from 1980–1988 there were a mere 52 cases involving Japanese parties, in which the Japanese side was the claimant only about 20% of the time. During the same time period, cases involving U.S. parties totaled 634, with the American side as claimant in nearly 50% of cases. From this data, it is possible to conclude that Japanese parties' use of arbitration in international disputes is stagnant and limited. "This may imply that alternative dispute resolution devices work well such as conciliation [sic] as regards disputes [sic] involving Japanese companies." *Id.* at 246–247.

fact, “[n]egotiation is so common in commercial settings that in some ways it scarcely merits separate status as an ADR technique.”¹¹³ Negotiation can be direct or facilitated by an intermediary, such as a conciliator, who helps disputants to negotiate with each other and transforms the dialogue into a conciliation. Failure to reach a mutual agreement through negotiation prompts the parties to turn to other ADR methods or outside elements of pressure that will enable them to reach a settlement.¹¹⁴ Successful negotiation, however, obviates the need for further dispute resolution.

Culture affects what constitutes negotiation. For example, “Americans tend to view negotiating as a competitive process of offers and counteroffers, while the Japanese tend to view the negotiation as an opportunity for information sharing.”¹¹⁵ Although the Japanese handle every business problem on a face-to-face basis,¹¹⁶ the interaction that results is not direct or argumentative. The Japanese do not like Western-style negotiation because it involves elements of disagreeable confrontation. “[A]n invitation to ‘horse trade’ provokes in many Japanese a certain aristocratic disdain for the merchant mind.”¹¹⁷ Rather, a Japanese gentleman influences his subordinates and others by subtle, indirect suggestion, relying upon their thorough indoctrination in a hierarchical society to ensure that orders are faithfully carried out. Instead of negotiation, Japanese business partners prefer to search for a compromise through “amicable discussions.”¹¹⁸ Because of their stereotyped reputation as being modest, hardworking, quiet and polite, the Japanese may seem to be “push-overs” in negotiations.¹¹⁹ Actually, the Japanese negotiation team, for cultural reasons already described, is among the most formidable a Westerner can face.¹²⁰

¹¹³ Katz, *supra* note 95, at 578.

¹¹⁴ See Sigvard Jarvin, *The Role of Conciliation, Contract Modification and Expert Appraisal in Settling International Commercial Disputes*, 4 INT’L TAX & BUS. LAW. 238, 238 (1986).

¹¹⁵ FOSTER, *supra* note 57, at 272.

¹¹⁶ See MARCH, *supra* note 7, at 88. Use of telephone or mail to discuss problems is extremely rare. *See id.*

¹¹⁷ *Id.* at 16.

¹¹⁸ See Reif, *supra* note 94, at 628–629.

¹¹⁹ See MARCH, *supra* note 7, at 157.

¹²⁰ *See id.* at 131. Actually, a team to negotiate with the Japanese should have at least two people. *See id.* at 71.

Successful negotiation, whether performed directly or through an intermediary, should not be discounted as a valuable method to resolve international commercial disputes. Business persons involved in direct negotiations must themselves have a detailed understanding of the culture of the other side to successfully interpret negotiating behavior.¹²¹ Use of a skilled intermediary, however, can remove from the parties a great deal of the onus of filtering cultural "noise." Use of an intermediary is a central feature of conciliation.

C. Conciliation¹²²

Conciliation, alone or as a step in the ADR process, provides another option for resolution of international commercial disputes. Whether conciliation or arbitration is preferred to resolve a particular dispute will depend upon the cultural and legal traditions of the parties.¹²³ Conciliation, perhaps the most ancient mode of dispute resolution,¹²⁴ has widely been preferred domestically in the Far East for hundreds of years.¹²⁵ It appeared on the international level in the early part of this century.¹²⁶ Use of the method, which utilizes an impartial third party who provides recommendations to the disputants in an attempt to resolve the conflict, experienced a drastic decline after World War II.¹²⁷ In recent years,

¹²¹ See SALACUSE, *supra* note 5, at 49.

¹²² "Conciliation appears to be a more familiar term in the international commercial context than mediation, although there can hardly be any substantive significance in the use of one term rather than the other." Alan Scott Rau & Edward F. Sherman, *Tradition and Innovation in International Arbitration Procedure*, 30 TEX. INT'L L.J. 89, 105 (1995). See also Reif, *supra* note 94, at 582 (noting "[t]here is a marked similarity between mediation and conciliation."). But see Reif, *supra* note 94, at 584 (stating "[although] the two terms are occasionally used interchangeably . . . a distinction between the two can be made in the degree of formality and level of initiative imposed on the third party. A mediation is more informal.").

¹²³ See Hoellering, *supra* note 4, at 67-68.

¹²⁴ See Lecuyer-Thieffry & Thieffry, *supra* note 3, at 588.

¹²⁵ See Reif, *supra* note 94, at 611.

¹²⁶ See *id.* at 583.

¹²⁷ See Hoellering, *supra* note 4, at 67. ICC statistics show that conciliation is less frequently used by disputants than arbitration. In the ICC's initial years from 1923-1929, conciliation was very popular. In 1929, of the 120 requests successfully concluded by the ICC Court, 80 were amicably settled, 21 were conciliated and only 19 underwent arbitration. From 1983-1987, resort to conciliation had sharply declined.

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however, conciliation has generated a great deal of interest in the West¹²⁸ and, as result of its comeback, is now found in every stratum of the transnational business system.¹²⁹

Conciliation works well for parties that refuse to submit to jurisdiction, whether that of another state or of an arbitral tribunal.¹³⁰ This makes the process well suited and extensively used in international relations,¹³¹ especially in commercial settings.¹³² Several organizations, such as the ICC and the American Arbitration Association, provide assistance with conciliation to resolve international commercial disputes. By agreeing that the process will be governed by institutional rules, such as the ICC's Conciliation Rules or the United Nations Commission on International Trade Law (UNCITRAL) Conciliation Rules,¹³³ parties can avoid the

During this five-year period, there were a mere 42 requests for conciliation, compared with 1545 requests for arbitration. These figures illustrate how arbitration came to dominate as the preferred method to resolve international disputes. *See* Reif, *supra* note 94, at 614–615.

¹²⁸ *See* Reif, *supra* note 94, at 611. Western parties may be interested in conciliation for many of the same reasons that led them from litigation to arbitration or preference for ADR generally. *See* Burton, *supra* note 92, at 638.

¹²⁹ *See* Reif, *supra* note 94, at 579.

¹³⁰ *See* Jarvin, *supra* note 114, at 239.

¹³¹ *See* Katz, *supra* note 95, at 585.

¹³² The General Agreement on Tariffs and Trade (GATT) incorporates variants of conciliation throughout the trade dispute settlement process in recognition of the limitations of the strict application of law in the international trade system. Most of the multinational free trade agreements allowed under GATT also provide for some form of conciliation to resolve disputes. *See* Reif, *supra* note 94, at 592–595. Conciliation is also promoted as the preferred method for resolution of conflict arising out of other trade-related agreements based upon treaty relationships, including the Organization for Economic Co-operation and Development (OECD) and the United Nations Conference on Trade and Development (UNCTAD). *See id.* at 602. Interestingly, organizations involved with international finance and development, such as the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (World Bank), the International Development Association (IDA) and the International Finance Corporation (IFC), do not use conciliation. Instead, they rely upon a variety of other ADR methods, such as arbitration. *See id.* at 603. Finally, at the request of the international investment community, countries have entered into a variety of bilateral treaties to protect the foreign investments of their nationals in the hopes of preserving an amicable relationship between the investor and the host state, thereby facilitating the continuation of the foreign investment. *See id.* at 607–608.

¹³³ ICC Rules of Conciliation provide only that “the conciliator shall conduct the conciliation process as he thinks fit, guided by the principles of impartiality, equity and

possibility of further disagreement involved in designing their own procedures.¹³⁴

Conciliation has many advantages over both litigation and arbitration, especially if one of the parties' cultural background is conducive to its employment. Conciliation is relatively quicker, less expensive and informal. Like arbitration, the disputants usually have substantial freedom to mold the process to their particular situation. It is also confidential and less adversarial. The "win-win" nature of conciliation promotes the maintenance of a harmonious international business relationship which could be damaged by more legalistic dispute resolution processes.

East Asian parties have a cultural predilection for nonadjudicative dispute resolution methods.¹³⁵ This preference stems from Confucian ethics and the traditional search for group harmony.¹³⁶ As discussed further

justice." Burton, *supra* note 92, at 639. UNCITRAL Conciliation Rules are longer but have a similar effect:

1. The conciliator assists the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.
2. The conciliator will be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.
3. The conciliator may conduct proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case, the wishes the parties may express, including any request by a party that the conciliator hear oral statements, and the need for a speedy settlement of the dispute.
4. The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefore.

See id. at 640.

¹³⁴ *See* Reif, *supra* note 94, at 585. Also, as a result of the worldwide presence of these organizations, dispute facilitators are readily available in many countries. This helps reduce delays and travel expenses. *See* Jarvin, *supra* note 114, at 245.

¹³⁵ *See* Lecuyer-Thieffry & Thieffry, *supra* note 3, at 635.

¹³⁶ *See* Reif, *supra* note 94, at 628.

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below, conciliation has been important in the Japanese system of justice for centuries. If a problem arises, the Japanese prefer harmony, long-term interest and behind-the-scenes agreements worked out quietly on the basis of compromise.¹³⁷ A go-between often speaks on behalf of the parties,¹³⁸ and apology is frequently as important as compensation.¹³⁹

Use of conciliation is not without disadvantages. By and large, however, the criticisms are answerable. First, economic disparity may give one disputant greater bargaining power, allowing a stronger party to coerce the weaker one into agreement. This argument confuses the role of the conciliator as a passive "neutral" with the conciliator's proper role as an active, "impartial" third party. The ICC requires that the conciliator be guided by "impartiality, equity and justice," and the UNCITRAL Conciliation Rules call for "objectivity, fairness and justice."¹⁴⁰ Thus, a conciliator must do equity to prevent injustice from coercion. This requires the conciliator to recognize and attempt to correct power imbalances.

Critics also claim that conciliation is a waste of money, time and effort should the process fail. Even if the process falters, however, the costs will not have been extreme or a total waste. Some residual benefits, such as clarification of facts and issues as well as completed legal research, will still be useful to any later litigation.

A third criticism of those who find fault with conciliation is that if one of the parties refuses to observe the terms of the agreement, enforceability may be a problem. The same uncertainty of enforcement, however, is present to some extent no matter which method of dispute resolution, including litigation or arbitration, is used.¹⁴¹

Finally and most powerfully, because the effectiveness of conciliation domestically in Asia "depends partly on social norms that support compromise, conciliation may fail in international transactions where similar norms are absent."¹⁴² In fact, in Western countries, a party who suggests conciliation is often suspected by the other Western party to have ulterior motives.¹⁴³ Thus, because they are more comfortable with judicial

¹³⁷ See MARCH, *supra* note 7, at 15.

¹³⁸ See *id.* at 16.

¹³⁹ See Broiles, *supra* note 34, at 134.

¹⁴⁰ Burton, *supra* note 92, at 639-640.

¹⁴¹ See Lecuyer-Thieffry & Thieffry, *supra* note 3, at 635-636.

¹⁴² Burton, *supra* note 92, at 638.

¹⁴³ See Jarvin, *supra* note 114, at 240.

means of conflict resolution, Western parties to an international commercial dispute may be reluctant to try conciliation. Still, conciliation, even if unsuccessful, usually benefits both sides and should more often play a part in the resolution of international commercial disputes. Conciliation "can fulfill a valuable role in transnational economic dispute settlement as an early, informal process that, if successful, obviates the necessity of resort to adjudicative mechanisms."¹⁴⁴

VI. THE BEST OF BOTH WORLDS: COMBINING CONCILIATION AND ARBITRATION

The above review of the use of traditional ADR methods in international commerce and examination of how cultural heritage affects the choice of method suggests that East Asian parties generally favor conciliation, while Western parties prefer arbitration. The next issue is whether there is a method that is optimal to most parties in most situations. Use of a combined method of conciliation and arbitration offers such an alternative, especially for disputes between Americans and Japanese.

Westerners have traditionally thought that conciliation should occur separately from arbitration, and the conciliator and the arbitrator should not be the same person. It was believed that settlement offers and confidential information disclosed in conciliation might endanger the ability of the conciliator to act as an objective arbitrator.¹⁴⁵ However, largely due to the influence of Asian cultures,¹⁴⁶ the traditional separation of arbitration and conciliation may be breaking down.¹⁴⁷

The confluence of Western business culture and Asian traditions makes the alternative of a combination of arbitration and conciliation attractive to parties from many cultures. Even if a dispute involves solely Western or solely Asian cultures, a combined method can produce positive results. For

¹⁴⁴ Reif, *supra* note 94, at 637.

¹⁴⁵ See Donahey, *supra* note 44, at 76. The UNCITRAL Rules of Conciliation, for example, do not permit a conciliator to act as an arbitrator in the same dispute. See *id.* at 77.

¹⁴⁶ See *id.*

¹⁴⁷ See Rau & Sherman, *supra* note 122, at 105. Now, conciliation is usually structured as an optional procedure, with either disputant able to refuse or withdraw from the process even in the face of a conciliation clause. Arbitration or some other settlement method follows if the conciliation attempt fails. See Reif, *supra* note 94, at 586-587.

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example, a blended procedure is the method of choice in the People's Republic of China. Asian parties to international contracts have learned to accept the possibility of arbitration when all negotiation and conciliation efforts have failed and the parties are no longer "friends." Meanwhile, Western parties can hedge their bets on conciliation with an arbitration option.¹⁴⁸

There are two main ways to combine conciliation with arbitration: the blended method and the conjoined method.¹⁴⁹ With the blended method, "the proceedings may move from conciliation to arbitration and back again with no clear lines of demarcation."¹⁵⁰ This makes it flexible and efficient. The tribunal can use conciliation to move toward an agreement in a spirit of cooperation as long as neither party shies away from continuing the conciliation. In Asia, a respected third party's recommendations may, for cultural reasons, have substantial influence,¹⁵¹ and obstinate parties from any culture may prefer to compromise knowing that the tribunal can impose an outcome should they remain in conflict. Furthermore, a blended procedure is very efficient because, should conciliation fail, the disputants need not choose and educate new arbitrators.¹⁵² When the conciliation successfully produces an agreement, the conciliator may include the result in an arbitral award. When the conciliation does not succeed, however, the tribunal will supply an award in the standard way.¹⁵³

A blended procedure does, however, have disadvantages as well. First, proficient conciliators and arbitrators require different mannerisms and skills. Not many individuals are capable of functioning effectively in both roles. Also, a blended procedure may ultimately interfere with the conciliation effort because the conciliator must often privately consult with each party to identify key interests and to design promising recommendations, without fully revealing the entire discussion to the other side. The possibility of later arbitration may interfere with this information exchange, and an arbitrator has the impossible task of total disregard of

¹⁴⁸ See Burton, *supra* note 92, at 638.

¹⁴⁹ See *id.* at 652-653.

¹⁵⁰ *Id.* Arbitration laws and rules in California and around the Pacific Rim allow parties to elect a blended procedure if they desire. See *id.*

¹⁵¹ It is not surprising, then, that a blended procedure is the method of choice in China. See *id.* at 638.

¹⁵² See *id.* at 653.

¹⁵³ See *id.*

information gathered in the conciliation when making an award.¹⁵⁴ Certain safeguards, however, are possible. The parties may, for example, agree in advance that upon failure of the conciliation, an arbitration award will follow only if neither party objects. Upon objection by a party, new arbitrators can be enlisted. Such safeguards, coupled with the significant cultural and practical advantages of a blended procedure, may obviate the risks of a blended procedure.¹⁵⁵

A conjoined method is another popular way to combine conciliation with arbitration and is the method employed in Japanese civil suits. With a conjoined method, a conciliation may be arranged as an initial stage to occur within a fixed time. When that time period expires, conciliators would be required to acknowledge the failure of their efforts. This event would then trigger the right of the parties to embark upon arbitration or litigation.¹⁵⁶ Thus, a facilitator attempts to conciliate the dispute prior to any arbitration.¹⁵⁷ This allows the disputants to employ different people to conciliate and arbitrate, unless they consent otherwise upon completion of the conciliatory stage. The parties may also agree not to introduce any statements or admissions made during the conciliation as evidence in any arbitral or judicial proceeding. In this way, the conciliation can be cleanly isolated from the arbitration.¹⁵⁸

A conjoined method lacks some of the advantages of a blended procedure. First, lacking a conciliator/arbitrator's silent power to impose a solution should cooperation be found wanting, the conciliator's success depends entirely on the conciliator's diplomatic talents. Second, the disputants will incur expenses in the selection and education of new arbitrators if the dispute goes to arbitration. However, the parties are free to agree to retain their conciliator to serve as arbitrator as well, allowing the avoidance of additional expenses when both sides conclude that no prejudice will ensue.¹⁵⁹

More importantly, a conjoined procedure offers solutions to the disadvantages found in a blended procedure because the integrity of any needed arbitration is maintained. The parties can enlist individuals with

¹⁵⁴ See *id.* at 654.

¹⁵⁵ See *id.* at 656.

¹⁵⁶ See Lecuyer-Thieffry & Thieffry, *supra* note 3, at 590.

¹⁵⁷ See Donahey, *supra* note 44, at 76.

¹⁵⁸ See Burton, *supra* note 92, at 656-657.

¹⁵⁹ See *id.* at 657.

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talents unique to each phase. Also, the parties can meet separately with the conciliator without endangering a later arbitration, and they can be more up front with the conciliator without prejudicing their positions in a later arbitration. By planning for confidentiality following the cessation of conciliation efforts, this historically Asian process can satisfy many of the concerns of those to whom the process seems foreign.¹⁶⁰ A conjoined process provides optimal advantages to both Western and East Asian parties.

Instead of automatically engaging in more antagonistic methods of dispute resolution, the international commercial community should use a conjoined ADR method to settle business disputes. Arbitration and conciliation need not be exclusive and in opposition with one another. Through utilization of an interrelated, complementary combination of conciliation and arbitration, international parties can work on a private, friendly basis to settle their differences in a flexible, business-like manner. In doing so, they can avoid much of the delay, expense and frustration inherent with arbitration or litigation, as well as increase the chance to participate in a healthy business relationship after settlement of the dispute.

Most Japanese would be shocked at any attempt to force a settlement upon the other party instead of resolving the dispute in a mutually conciliatory fashion. "In Japan, when a problem arises, the Japanese will think, first, of conciliation, second, of profusely apologizing."¹⁶¹ Traditional conciliation, which has played the most significant role, has, however, evolved over several hundred years¹⁶² into a conjoined process of conciliation and arbitration. The arbitration component may partially be a result of Western influence, just as the rising popularity of conciliation in Western countries arises to some extent from exposure to Far Eastern methods of dispute resolution.

The criticisms of conciliation in Japan echo some of the critical comments about Western ADR. For example, excessive use of conciliation is said to inhibit the evolution of legal rules required for modern Japanese society's further development of commerce and of community life. As a result, extensive reliance upon conciliation tends to injure the co-existing legal system and the ability of the legal system to address social concerns

¹⁶⁰ See Donahey, *supra* note 44, at 75.

¹⁶¹ MARCH, *supra* note 7, at 119.

¹⁶² See Reif, *supra* note 94, at 628.

with rules that benefit society as a whole. As stated by one commentator:

These traditions have often been criticized as backwards, and an obstacle to the modernization of Japan. . . . The informal modes of traditional ADR favored by the Japanese people had been regarded as oppressive devices for imposing outdated community values or moralities, at the cost of sacrificing individual rights and freedom of contract.¹⁶³

Some also feel traditional methods of conflict resolution in Japan may have damaging psychological effects:

Latent tensions and dissatisfaction may actually be more prevalent . . . precisely because of the inhibitions on conflict expression. Japanese, furthermore, rarely feel they have the option to leave a relationship. Without the options of either exit or expression, the lack of cathartic resolution and fundamental adjustment in the relationship may produce a deep and persistent sense of malaise. This outcome implies that it is the individual, rather than the group or society, who bears the cost of conflict in Japan.¹⁶⁴

Many of these criticisms can be somewhat assuaged by pointing out that conciliation for the settlement of civil disputes in the Japanese court system is optional. Besides, it is doubtful that unbridled individualistic expression, instead of the exercise of partial restraint by both parties, would produce more comfortable results for all parties. Win-lose outcomes would become the rule.

Although conciliation normally requires no authority other than the agreement of the parties, modern Japanese conciliation is statute-based. In 1951, the Civil Conciliation Law formally incorporated an extra-legal conciliation mechanism within Japan's court system.¹⁶⁵ Although most disputes never reach the courts, "[t]hose that do are often settled in a

¹⁶³ Iwai, *supra* note 108, at 475. See also Broiles, *supra* note 34, at 133-134 (stating that "[f]ailure to litigate cases involving issues of public interest, like whether products are safe or unsafe, tends to cover up bad laws and practices.").

¹⁶⁴ Ellis S. Krauss et al., *Conflict and Its Resolution in Postwar Japan*, in CONFLICT IN JAPAN 381 (Ellis S. Krauss et al. eds., 1984).

¹⁶⁵ See Broiles, *supra* note 34, at 134.

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traditional manner under the judge's guidance."¹⁶⁶ Upon notice of the action, either one of the disputants or the court may initiate conciliation prior to adjudication. A judge may act alone as a conciliator, or a conciliation committee may be formed by a judge and two civilian commissioners appointed by the court.¹⁶⁷ Civil conciliation commissioners are chosen from among citizens aged between forty and sixty-nine with profound general knowledge. They should be "qualified as attorneys, have knowledge useful in the resolution of civil disputes, or have sufficient skills and experience in social life."¹⁶⁸

The Civil Conciliation Act allows conciliators, with the advance written agreement of the parties, to issue a binding decision when efforts at conciliation fail. As a result, "the conciliation process can ultimately become an arbitration process."¹⁶⁹ The arbitration decision is then entered as a judgment by the court. In effect, domestically the Japanese use a conjoined method to resolve disputes. This suggests that they would welcome the opportunity to participate in such an already familiar process on the international commercial level with Westerners in search for nonadjudicative alternatives to dispute resolution.

VII. SELECTION OF THE WELL-SOCIALIZED FACILITATOR

In addition to utilization of a conjoined ADR method, use of a facilitator well-socialized in the cultures of each of the disputants will lead to greater success in the resolution of international commercial disputes. "Socialization" is the systematic means by which new members are brought into a culture. Thus, regardless of the nationality of the individual chosen, a "well-socialized" facilitator must possess enough experience and familiarity with the cultures of the disputants to be able to (1) comprehend the group's norms and values and (2) perform appropriate role behaviors.¹⁷⁰

Before highlighting the qualities to look for in a well-socialized facilitator, there are a few potential problems with internationally

¹⁶⁶ Lynn Berat, *The Role of Conciliation in the Japanese Legal System*, 8 AM. U. J. INT'L L. & POL'Y 125, 154 (1992).

¹⁶⁷ See Reif, *supra* note 94, at 628-629.

¹⁶⁸ ODA, *supra* note 35, at 83.

¹⁶⁹ Donahey, *supra* note 44, at 76.

¹⁷⁰ See Katz & Seifer, *supra* note 8, at 34.

experienced individuals that demand a word of caution. First, cultural sensitivity can be taken to extremes. "You can become so culturally sensitive that you become inoperable. This isn't about hearts and flowers and international peace and love. Sometimes you want to break a cultural taboo if it will help you get what you want."¹⁷¹ Second, a person with international experience may have "gone native," thus causing favoritism toward one side.¹⁷² The facilitator hired should not compromise a position by empathetically advocating the views of the other side.

Also, although no individual who visits a foreign country is expected to act exactly like the native people, the parties may be less forgiving of blunders by a well-socialized negotiator or facilitator who should know better. For example, the Japanese will less readily excuse social or linguistic mistakes of a bicultural American hired to negotiate on behalf of the American party. "If you make a social error but you speak only English, it's a little . . . excusable. But to make the same error while speaking the language perfectly makes it that much worse."¹⁷³

Next, there are some negotiators who claim to be "international quarterbacks,"¹⁷⁴ able to intercede with anyone, anytime, anywhere. Neither all disputes nor all cultures were created equal. Each requires particular sensitivity or expertise and needs special handling. Finally and most importantly, the facilitator must avoid stereotypes when transacting business or attempting to resolve a dispute. Success ultimately depends upon the realization that every company and every individual is unique.¹⁷⁵

With an awareness of the potential pitfalls of persons with some experience of other cultures in mind, it is safe to turn to what qualities a well-socialized facilitator should possess. Learning a culture other than one's own is not easy. It requires several years of study, mastery of the local language, a knowledge of history and a prolonged residence in the country of the culture.¹⁷⁶ There are certain traits to look for in a well-socialized facilitator.

¹⁷¹ Sands, *supra* note 12, at 7.

¹⁷² See Katz & Seifer, *supra* note 8, at 42.

¹⁷³ Sands, *supra* note 12, at 4.

¹⁷⁴ *But cf.* Chu, *supra* note 73, at 39 (noting that lead counsel in a cross-border acquisition should become an "international quarterback" to coordinate due diligence efforts).

¹⁷⁵ See MARCH, *supra* note 7, at 79.

¹⁷⁶ See SALACUSE, *supra* note 5, at 53-54.

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First and foremost, a successful international facilitator must possess certain general personality characteristics. To promote communication and participate in problem-solving, the individual needs empathy. The facilitator must also have the ability to develop long-standing relationships and effectively interact with people whose value systems, beliefs, customs, manners and ways of conducting business may be vastly different.¹⁷⁷ Individuals who are nonjudgmental and nonevaluative when interpreting the behavior of others will be more effective.¹⁷⁸ As for the resolution of commercial disputes that involve a Japanese party, "even the bitterest conflicts with the Japanese are resolvable if we can develop a comprehensive understanding of their needs, perceptions and feelings."¹⁷⁹ For this, high-level skills in human relations are crucial.

Second, the potential pitfalls of language described above suggest that facilitators should be functionally bilingual. A facilitator who is bilingual can promote regular dialogue and better understanding between the parties, which will generate greater confidence in both the third party and ADR process.¹⁸⁰ Perfect fluency is not required. Instead of worrying about making linguistic mistakes, the facilitator should show confidence in interacting with people and attempt to make use of conversational idioms and anecdotes.¹⁸¹ For conflicts that involve the Japanese, facilitators who understand the culture and speak Japanese can be vital to hands-on relations with the Japanese.¹⁸² Depending upon a person's background, however, "it may take him or her three times as long to learn Japanese than another European language."¹⁸³ Knowing the language is definitely important, but with the Japanese, knowing body language and gestures can be equally important.¹⁸⁴

Third, the study of another language or culture in the isolation of a classroom has limited value. Mere recognition of cultural differences is not

¹⁷⁷ See Katz & Seifer, *supra* note 8, at 32, 38.

¹⁷⁸ See *id.* at 39.

¹⁷⁹ MARCH, *supra* note 7, at 89 (emphasis omitted).

¹⁸⁰ See Reif, *supra* note 94, at 578, 586.

¹⁸¹ See Katz & Seifer, *supra* note 8, at 39.

¹⁸² See MARCH, *supra* note 7, at 65.

¹⁸³ CHONG JU CHOI, CULTURAL COMPETENCES: MANAGING CO-OPERATIVELY ACROSS CULTURES 106 (1995).

¹⁸⁴ See Wilcox, *supra* note 11, at *2-3.

enough basis to tolerate cultural differences when conflicts occur.¹⁸⁵ “To be a successful negotiator, one really needs, first, to live in and understand the market that one is dealing with, not only from one’s own viewpoint, but also from that of the other side.”¹⁸⁶ Marriage or other close association to a person from another culture or being raised in a bicultural setting may promote similar skills. There is some question whether the parties will accept a facilitator of the other side’s nationality. That a facilitator has strong personal relations with non-natives, a command of the language and a deep knowledge of the culture shows true commitment and establishes a feeling of trust in the non-native party.

Next, to maintain productive international commercial relations, “[c]onsultation with persons who have had significant business experience in [the country] can also be helpful.”¹⁸⁷ Because parties should also understand their legal rights in order for an agreement to be fair and self-enforcing over the long term, a facilitator knowledgeable in the law may also help. Lawyers are well-suited to facilitate international commercial disputes because their professional role already includes such activities as negotiating, consulting, researching, conciliating and planning. In addition to knowledge of the law, legal training also instills useful skills, such as logical thought, foresight and language facility. In fact, the majority of ICC arbitrators are attorneys.¹⁸⁸ The Japanese, too, prefer “veteran lawyers” as conciliators.¹⁸⁹

Finally, the degree of difference between the countries of the parties must be considered, and “[t]he cultures of some countries require more adaptation than others.”¹⁹⁰ If the dispute is with a party from a fairly novel and different culture, such as Japan from an American point of view, emphasis must be placed on finding a facilitator whose personality characteristics can straddle both cultures.¹⁹¹

¹⁸⁵ See MARCH, *supra* note 7, at 33.

¹⁸⁶ *Id.* at 78–79.

¹⁸⁷ SALACUSE, *supra* note 5, at 54.

¹⁸⁸ See Jarvin, *supra* note 114, at 243.

¹⁸⁹ See NIHON BENGOSHI RENGOU KAI [JAPANESE BAR ASSOCIATION], BENGOSHI NO TANOMIKATA: Q & A [HOW TO REQUEST AN ATTORNEY: QUESTIONS AND ANSWERS] 12 (1996).

¹⁹⁰ Katz & Seifer, *supra* note 8, at 34.

¹⁹¹ See *id.* at 41.

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A facilitator well-socialized in the cultures of the disputants can help no matter what type of ADR process the parties to an international commercial dispute ultimately choose. A negotiator or facilitator that understands the culture can greatly reduce the chances of one side offending the other. With arbitration, many of the rough edges of the process can be smoothed by selection of a culturally sensitive third party.¹⁹² Because conciliation requires a facilitator who is fully able to consider the rights and obligations of both sides, the usage of the trade and the circumstances surrounding the dispute,¹⁹³ an individual highly familiar with the backgrounds of the disputants is essential. "[A] pair of conciliators, one chosen by each party, may help to bridge the cultural gap. More often, however, a single conciliator who is familiar with both cultures may be more helpful"¹⁹⁴ because a single conciliator is less likely to feel obligated to a particular side and can, therefore, better facilitate understanding between parties from different cultural paradigms. With a conjoined method, the distinction between the function of the arbitrator and that of the conciliator may, of course, be blurred. This suggests even greater care is required in the selection of a well-socialized facilitator, one who is an excellent communicator and an uncompromisingly fair peacemaker.

VIII. CONCLUSION

The inability to quickly resolve international commercial disputes is too costly, given the importance of international trade to each country. As a result of the continuing expansion of companies into the dynamic arena of international business, the demand for alternative methods of dispute resolution will grow further. The conjoined ADR method used by the Japanese that combines conciliation and arbitration promises to be the most flexible alternative for the resolution of international commercial disputes. International contracts, especially those between East Asian and Western parties, should include advance dispute resolution provisions that specify both the use of a conjoined ADR process and the selection of a facilitator well-socialized in the cultures of the disputants to assure the speedy, amicable resolution of international commercial disputes.

¹⁹² Indeed, "an arbitration can turn into a nightmare when highly skilled arbitrators are not available." Burton, *supra* note 92, at 637.

¹⁹³ See Reif, *supra* note 94, at 617.

¹⁹⁴ Burton, *supra* note 92, at 639.

